IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 52 OF 2004

Shri Stanley Barros Pereira
Major, Son of late Bossuet
Barros Pereira,
Resident of House No.28
Cansaulim Goa. ... Appellant

versus

1. Smt. Julieta Cota e Clemente
   Major, Wife of Arvind Clemente
   Resident of House No.not known,
   Julieta Mansion,
   Off. St. Joaquim Road,
   Borda-Margao Goa.

2. State of Goa,
   Through Public Prosecutor,
   Panaji-Goa. ... Respondents

Mr. E. Dias, Advocate for the Appellant.

Mr. A. F. Diniz, Advocate for the Respondent No.1.

CORAM : N. A. BRITTO, J.

DATE : 17TH AUGUST, 2006

ORAL JUDGMENT

This is complainant's appeal against the acquittal of

the accused under Section 138 of the Negotiable Instruments Act, 1881(Act, for short).

2. The complainant prosecuted the accused with the allegation that the complainant had supplied to the accused various items of furniture and towards part payment of the amount due, the accused had issued a cheque dated 10-3-1998 in the sum of Rs.1.5 lakhs drawn on Goa State Co-operative Bank Ltd., Borda, Margao and when the said cheque was presented by the complainant at Corporation Bank, Utorda, Goa, the same was returned with endorsement dated 20-8-1998 "that the account is closed" and thereafter the accused issued a legal notice dated 25-8-1998 requiring the accused to pay the said amount within 15 days which the accused failed to comply and as such the complainant presented the said complaint on 17-9-1998.

3. The complainant examined himself and the Bank Manager of Corporation Bank, Utorda Branch. The accused did not examine any witnesses but it was the case of the accused that she had issued the said cheque in connection with some other transaction and that she had paid the complainant the cash

and had asked for the return of the cheque which the complainant refused. It was her case that she was falsely implicated. The accused did not step into the witness box to rebut the evidence of the complainant or for that matter the presumption which the complainant had in his favour in the light of various provisions of the Act including Section 139 of the Act.

4. The learned J.M.F.C. in acquitting the accused observed that the subject cheque had become invalid and it could not have been presented once again for payment as the account of the accused was already closed and the complainant was already intimated about the same. The learned J.M.F.C. further observed that as the requirement of the proviso (a) of Section 138 was not complied with, it had to be held that the notice of demand was issued beyond the stipulated period and consequently the complaint was also lodged beyond the period of limitation.

5. At the time of arguments, Mr. E. Dias, the learned Counsel on behalf of the complainant has submitted that although the subject cheque was returned for the first time on

20-4-1998, the complainant had not issued any notice in terms of Clause (b) of the proviso to Section 138 of the Act and therefore in the absence of any notice having been issued no cause of action had arisen in favour of the complainant. Mr. Dias has submitted that the complainant was at liberty to present the said cheque again for payment and it is only in the event the complainant had issued a notice of demand that the complainant would have forfeited his right to present the said cheque again. In this context, Mr. Dias has placed reliance on the cases of **Sadanandan Bhadran** v. **Madhavan Sunil Kumar** (AIR 1998 SC 3043) as well as **Prem Chand Vijay Kumar** v. **Yashpal Singh and another**((2005) 4 SCC 417). Mr. Dias has next submitted that even if the account of the accused was closed earlier, the complainant could have presented the cheque again, even after the account was closed, as long as the notice was not issued to the complainant and in this context Mr. Dias has relied on the case of **NEPC Micon Ltd. and others** v. **Magma Leasing Ltd.**(AIR 1999 SC 1952). Mr. Dias has submitted that closing of the account does not make the cheque invalid and the same could have been submitted by the complainant within six months since with the presentation each

time the complainant got a fresh right and not a cause of action to file the complaint.

6. On the other hand, Mr. A. F. Diniz, the learned Counsel on behalf of the accused has submitted that the expression "period of validity" in Clause (a) of the proviso to Section 138 of the Act is nowhere defined. Mr. Diniz has submitted that a cheque ceases to be valid after the account is closed and once the account is closed to the knowledge of the complainant the complainant cannot re-present it again and in case the complainant wishes to prosecute the accused then he has to follow next, the other conditions laid down in the Act for a successful prosecution. Mr. Diniz has referred to the evidence of Shri Hadiga/PW2, the Manager of Corporation Bank and has submitted that since he stated that the complainant could not have presented the said cheque again it only follows that it had become invalid or in other words it had ceased to have validity and therefore could not have been presented again. Mr. Diniz has next submitted that the view held by the learned J.M.F.C. is also a plausible view and therefore need not be interfered with in this appeal.

7. Mr. Dias has again submitted that the opinion expressed by Shri Hadiga/PW2 is not the law.

8. As far as the facts go, there is no dispute about the same. The subject cheque was presented by the complainant in his account at Corporation Bank for the first time and was returned on 20-4-1998 with endorsement "account closed". The said cheque was again deposited by the complainant on 16-8-1998 and was returned for the second time on 22-8-1998. Shri Hadiga/PW2 also stated that once the account is closed the same cannot be re-opened and as a routine matter, they do not accept the cheque again if it carries an endorsement "that the account is closed" and that he did not know why the cheque was accepted for the second time inspite of the said endorsement, for the first time.

9. The controversy in this appeal is in relation to Clause (a) of the proviso to Section 138 of the Act which reads as follows:-

> "(a) the cheque has been presented to the Bank within a

> period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier"(Emphasis supplied).

10. The object behind Section 138 is well known and it could be reiterated and that is to enhance the acceptability of cheques in settlement of liabilities by making the drawer liable for penalties in case of bouncing of cheques due to insufficiency of funds in the accounts or for the reason that it exceeds the arrangements made by the drawer, with adequate safeguards to prevent harassment of honest drawers. At the same time for a successful prosecution a time bound frame of strict terms and conditions have been imposed and unless the affected party files a written complaint after satisfying all the statutory conditions then only an offence committed can be taken cognizance of. The conditions are:- (a) the person must have drawn the cheque on an account maintained by him in a Bank for payment of certain amount of money due to another person from out of that account for the discharge of any debt or other liability; (b) that the cheque was presented to the Bank within a period of six months, from the date on which it is drawn or

within the period of its validity, whichever is earlier; (c) the cheque is returned by the Bank unpaid, either because the amount of money standing to the credit of the account is insufficient to honour the cheque or it exceeds the amount arranged to be paid from an account by an agreement made with the Bank; (d) the payee or the holder in due course of the cheque, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within fifteen days of the receipt of information by him from the Bank regarding the return of the cheque as unpaid; (e) the drawer of such cheque fails to make the payment of the said amount of money or the holder in due course of the cheque, within fifteen days of the receipt of the notice; (f) The complaint is filed within one month of the date on which the cause of action arises.

11. Therefore, it can be seen from Clauses (a) to (c) of the proviso to Section 138 and sub-section (b) of Section 142 of the Act, that the Act has provided for a strict time frame which has got to be followed for a successful prosecution under Section 138 of the Act.

12. The Apex Court in the case of **Sadanandan Bhadran** v. **Madhavan Sunil Kumar**(supra) has held that the primary interest of the payee is to get his money and not prosecution of the drawer, recourse to which, normally, is taken out of compulsion and not choice and for the said reason it must be held that a cheque can be presented any number of times during the period of its validity. The object behind that finding has been further explained by the Apex Court in the case of **Prem Chand Vijay Kumar** v. **Yashpal Singh and another**(supra) since it is not uncommon for a cheque being returned due to insufficient funds or similar such reasons and being presented again by the payee after some time, on his own volition or at the request of the drawer, in expectation that it would be encashed. The Supreme Court has reiterated its earlier view by stating that on each presentation of the cheque and its dishonour, a fresh right - and not a cause of action - accrues in his favour and therefore he, may, without taking pre-emptory action in exercise of his such right under clause (b) of Section 138, go on presenting the cheque so as to enable him to exercise such right at any point of time during the validity of the cheque. The question therefore is whether when the complainant presented

the said cheque, for the second time whether the same was still valid?

13. The principle set out in the case of **Sadanandan Bhadran** v. **Madhavan Sunil Kumar**(supra) and **Prem Chand Vijay Kumar** v. **Yashpal Singh and another**(supra) that a payee can go on presenting the cheque so as to enable him to exercise such right at any point of time during the validity of the cheque pre-supposes that the account itself is live and is not closed and therefore a payee is entitled to go on presenting the cheque during its time of validity before he decides to give a notice as required under clause(b) of Section 138 of the Act. The decision in the case of **N. A. Issac** v. **Jeemon P. Abraham and another** (2005 ALL MR(Cri) 1519) is of no assistance to the case of the complainant because in that case the cheque was from an account which was already closed. Admittedly, in the case at hand, the complainant had presented the cheque for the first time and was informed on 20-4-1998 that the account was closed. It has been stated by Shri Hadiga/PW2 that a closed account cannot be re-opened again and therefore one is not able to understand the wisdom of the complainant in presenting the

said cheque again on 16-8-1998 after the complainant was informed that the account was closed on 20-4-1998. Shri Hadiga/PW2 has stated that the Banks do not accept a cheque again if it is returned for the first time with endorsement that the account is closed. It is submitted on behalf of the complainant that what Shri Hadiga/PW2 stated is not the law. However, in the absence of any evidence having been led on behalf of the complainant the said statement of Shri Hadiga/PW2 has got to be considered and accepted as a banking practice followed by the Banks. The complainant having come to know that the account was closed on 20-4-1998 the complainant had no other option but to proceed to give a notice as required under Section 138, proviso (b) of the Act, within thirty days of the receipt of the information from the Bank i.e. from 20-4-1998 but the complainant instead of doing the same chose to compute thirty days of giving notice from the time the complainant was informed for the second time that the account was closed i.e. 16-8-1998. From the evidence of Shri Hadiga/PW2, it is clear that the cheque had become stale or invalid after the complainant was informed on or about 20-4-1998 that the account of the accused was closed and it

follows therefrom that the cheque in question, after the complainant was informed that the account was closed had lost its validity and therefore could not have been presented again after it had become stale or invalid. In other words, the complainant presented the said cheque for the second time not during its validity but after it had become stale or invalid. The notice as required under clause (b) of the proviso to Section 138 had therefore to be given within thirty days not from the second date when the complainant was informed but from the first date when the complainant was informed that the account was closed. The notice which has been given after thirty days from the second date and not from the first date therefore could not have been considered to have been given in compliance with the provisions of clause (b) of the proviso below Section 138 of the Act. The provisions of Section 138 create strict liability and being penal provisions have got to be construed strictly. Since the cheque was presented after it had become stale or invalid after the complainant was informed for the first time that the account was closed it follows therefrom that the complainant had failed to strictly comply with the provisions of clauses (a) and (b) of the proviso to Section 138 of the Act. In this

context, reference could be made to page 383 of the Tannan's Banking Law and Practice in India wherein it is stated thus:-

> "It is also necessary for the paying Banker to see that the cheque presented is not stale, or out of date. A cheque is said to be stale when it has been in circulation for an unreasonably long period. What is to be regarded as an unreasonably long period is determined by the nature of the instrument, the usage of trade, the practice prevalent among Bankers and the circumstances of the particular case. "It was either a custom of the trade of nothing", per Farewell, L.J., in Lloyds Bank v. Swiss Bankverein, 29 Times LR 219 at p.222. It is understood that Bankers in India regard a cheque stale, when it has been outstanding for more than six months. There may be differences in practice in various parts of India. In the case of dividend warrants, however, the issuing companies which issue them usually do not honour them if they are presented more than three months after the dates of their issue, unless they are subsequently revalidated by the companies concerned. It may be noted that in order to remove any ambiguity in this regard, where it is intended to limit the

> currency of a cheque, dividend warrant, etc., to a period of less than six months, such instruments are usually marked, say "current for three months only". A stale cheque may also be honoured by the drawee Bank, after getting it confirmed by the drawer".

14. The complainant cannot derive any benefit from the judgment in the case of **Capital Syndicate** v. **Jameela**(2003(2) Crimes 122) wherein a Single Judge of Kerala High Court has held that a cheque to be valid, should specify the amount and also the details regarding the payee and if at the time of issue the amount is not specified and the payee is uncertain, the cheque does not become a valid negotiable instrument.

15. As stated by Shri Hadiga/PW2 the subject cheque had become stale after the complainant was informed for the first time that the account was closed and therefore it could not have been presented again. The second presentation of the cheque by the complainant was not within the validity period of the said cheque as per banking practice though otherwise it was within a period of six months as contemplated by clause (a) to the

proviso below Section 138. Any notice therefore to be given, had to be given within thirty days from the first date when the complainant was informed that the account was closed. The complainant failed to prove that he had strictly complied with both the clauses (a) and (b) of the proviso. In this view of the matter, no fault could be found with the acquittal of the accused. There is no substance in this appeal. Consequently, the same is hereby dismissed with no order as to costs.

N. A. BRITTO, J.

RD.